

Mishcon de Reya Solicitors

Employment briefing from Mishcon de Reya published in the November 2009 issue of The In-House Lawyer:

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THE
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Retirement at 65 has had its Heyday



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AS HAS BEEN WIDELY REPORTED, THE HIGH Court in *R (on the Application of Age UK) v Secretary of State for Business, Innovation and Skills* [2009] has found that the default retirement age (DRA) of 65 is justified and can remain for the time being, although the judge gave a strong indication that it will have to be raised after next year's government review.

Since the implementation of the Employment Equality (Age) Regulations 2006 (the Regulations), 65 has been set as a DRA, which means that from that age employers can retire employees without liability for age discrimination or unfair dismissal, provided detailed procedures are followed.

SUMMARY OF JUDGMENT

In *Age UK*, originally brought by Age Concern, Age UK (a new organisation that encompasses Age Concern, also referred to as Heyday and Help the Aged) challenged the legality of the Regulations that came into force on 1 October 2006. After *Age UK* was referred to the European Court of Justice, it returned to the High Court for it to decide whether the government could show sufficient evidence to support the argument that having a DRA of 65 is a proportionate means of achieving legitimate social and employment policy aims.

There were two strands to the challenge. Age UK claimed that the Regulations were inconsistent with the European Equal Treatment Directive (the Directive) in two respects:

- i) allowing employers to justify direct age discrimination; and
- ii) allowing employers to fairly dismiss employees who have reached the age of 65 on grounds of retirement.

Age UK claimed first that there should be no DRA at all and, alternatively, that if a DRA was found to be legitimate, it should be older than 65.

The first argument, relating to the justification of direct age discrimination, is dealt with very briefly in the judgment. The High Court found that the Regulations merely replicate the language of the Directive. Unlike other forms of discrimination, there is nothing to suggest that the kinds of

business reasons that can justify indirect discrimination should not also apply to direct discrimination. In this regard, the legislation recognises that age discrimination is unlike any other form of discrimination.

The judgment contains a detailed discussion of the social policy benefits and drawbacks of a DRA of 65, in an effort to assess whether the government is able to justify it. As the High Court points out, there is a real policy tension in this area. On the one hand, there is the government's interest in promoting employment, continuity of employment, tax revenues from people who remain in employment after 65, reducing the burden on the state pension, and ensuring that as people live longer, they work longer and are able to lead both socially and economically productive lives. On the other hand, there is a need for clarity and flexibility, and a need to maintain competitiveness, address issues such as career planning and ensure availability of jobs to workers of different ages.

In its examination of the social policy objectives of the legislation, the High Court looked at the result of the extensive consultation exercise carried out between 2001 and 2006. It also considered various studies commissioned by the Department for Trade and Industry (DTI), as it then was, and focused in particular on one study by a social policy economist and another by a human resources specialist. The report of the human resources specialist, which was published in March 2006, was based on research carried out at 30 employers,

'In particular, the available evidence shows that, except in a very limited range of jobs, work performance does not deteriorate with age at least up to the age of 70.'

SOCIAL POLICY AIMS OF THE DEFAULT RETIREMENT AGE

In justifying the concept of a default retirement age the government relied on the following aims:

- workforce planning;
- avoiding an adverse impact on the provision of occupational pensions and other work-related benefits;
- the protection of the dignity of workers at the end of their working lives;
- improving the participation of workers in the 50-64 age group; and
- encouraging culture change.

'It creates greater discriminatory effect than is necessary on a class of people who both are able to and want to continue in their employment. A higher age would not have any detrimental labour market consequences or block access to high-level jobs by future generations. If the selection of age 65 is not necessary it cannot therefore be justified.'

Mr Justice Blake, commenting on the default retirement age of 65.

at senior management level. The research found that there was an overwhelming desire for a national retirement age and the interviewees identified various reasons for imposing a DRA, including the view that:

'There is generally deterioration in performance as people get older and retirement is a satisfactory way of ending the employment relationship with dignity. Performance management schemes are not seen as the right way of dealing with those at the end of a long and successful career.'

At the conclusion of this report, various recommendations were made that included:

- the introduction of a national retirement age of 65;
- if considered necessary, a right for employees to be considered for post-65 working to be mutually agreed;
- the announcement of a review of the impact of the legislation within five to ten years.

These recommendations clearly proved influential in the ultimate decisions taken

by the government as all feature in the Regulations. Age UK claimed that the government was unduly influenced by this report, which it alleged contained stereotypical views that were inconsistent with the principles of the Directive. In particular, the available evidence shows that, except in a very limited range of jobs, work performance does not deteriorate with age at least up to the age of 70. Beyond that age, there is virtually no reliable evidence due to the small number of people employed.

The High Court accepted that the concept of a default retirement age was justified by reference to legitimate social policy aims (see box on p22). It held that the existence of a set retirement age is a means of providing certainty and facilitating planning for employers and employees. Whether or not that retirement age should have been set at 65 is another matter.

The High Court found that there were compelling arguments for adopting an age over 65 instead and seemed to favour the age of 68. However, the High Court reluctantly accepted that a retirement age of 65 was justified for the time being, but only on the basis that it is subject to an imminent government review (recently brought forward to 2010). In the rather surprising concluding paragraphs, the judge comments that if the Regulations had been adopted for the first time in 2009, or there had been no indication of an imminent review, he would have concluded that the age of 65 was unlawful.

IMPLICATIONS

We have known for some time that a national retirement age of 65 is not sustainable. The government has already committed to raising the state pension age to 68 by 2044, and logically the default retirement age should be raised to keep pace with this. The Pensions Commission has in fact suggested

that the DRA should be set higher than the state pension age. It is now only a matter of time before the DRA is increased. Given the remit of the government's 2010 review, it is not inconceivable that the DRA will be abolished altogether (although this would be extremely unpopular with employers).

If a DRA is retained it is not clear whether the existing 'duty to consider' procedure would also be retained. It has been criticised for being too focused on form rather than fairness. An employer could feasibly turn down all requests to continue working post retirement without giving any reason, and without liability, provided that the correct notification is given and the proper meetings are held. According to research carried out by the Confederation of British Industry (CBI), 81% of employers have in fact accepted the requests made by employees under the procedure. If this research is correct, then the procedures do seem to be working. However, the figures do not show the kind of extensions granted or the proportion of employees who have actually been notified of their right to request continued work.

For the moment, employers can continue to operate their retirement procedures and can continue to retire employees who reach 65 as a matter of course. However, it is clear following this decision that it will not be long before employers have to start preparing for a change. The consequences of a growing population, increased life expectancy, underfunded pension schemes and the lack of any private pension provision for many workers means that raising the retirement age is just one of many essential measures that we can expect in the years to come.

R (on the application of Age UK) v Secretary of State for Business, Innovation and Skills [2009] EWHC 2336, (Admin)

Workers can reclaim holiday lost to sickness

THE EUROPEAN COURT OF JUSTICE (ECJ) recently decided in the case of *Vincente Pereda v Movilidad SA [2009]* that a worker who falls ill on holiday can choose to take the holiday lost to sickness at a later date. If the holiday cannot be re-arranged for the same leave year then the worker must be given the right to carry over the holiday

to the following year. The judgment follows on from *Revenue and Customs v Stringer & ors [2009]*, which gave workers on long-term sick leave the right to continue to accrue holiday, and while member states may allow such holiday to be taken during sick leave, the ECJ in *Pereda* held that a worker cannot be precluded

from taking it at a different time. The ruling will therefore compel employers to grant a new period of holiday for workers who lose holiday to unexpected sickness, if the worker so requests. In addition, the ability for employers following the *Stringer* judgment to allocate part of the sick leave as holiday to prevent an unmanageable build up appears to have been blocked (unless the worker agrees). The end result seems to be that employees can choose to do what suits them best.

SO WHAT SHOULD EMPLOYERS DO NOW?

For private employers, the *Pereda* decision does not have any direct effect and so they

may be able to argue that the Working Time Regulations (WTR) – which do not allow employees to unilaterally change their holiday dates – still apply, and wait for the government to change them. However, this approach may be risky as an employment tribunal could be persuaded that the WTR are capable of interpretation so as to give effect to the *Pereda* decision. The more prudent course of action is to assume that *Pereda* applies, and to review and amend any sickness policies accordingly. This means removing any prohibition on reclaiming holiday lost to sickness and, to prevent abuse, ensure that notification and certification procedures apply equally

to sickness absence during a pre-booked holiday. For those employers paying only statutory sick pay, abuse will no doubt be less likely. However, where contractual sick pay is paid, thought should be given to ways in which the entitlement may be subject to additional hurdles (such as medical evidence for shorter periods) where sickness coincides with holiday. As always, such action is not straightforward and employers will need to proceed with care.

Revenue and Customs v Stringer & ors [2009] UKHL 31

Vincente Pereda (Free Movement of Persons) [2009] EUECJ C-277/08

Guidance on trigger points for collective redundancy consultation

IN ANOTHER CASE, *AKAVAN ERITYISALOJEN Keskusliitto AEK & ors v Fujitsu Siemens Computers Oy* [2009], the European Court of Justice (ECJ) has given guidance on the meaning of ‘contemplating’ redundancies for the purposes of collective consultation. The ECJ held that the duty to consult is triggered once a strategic or commercial decision is taken that compels the employer to contemplate or plan for redundancies. There must therefore be an intention on the part of the employer to make redundancies. The case is interesting because it is believed to be the first time the ECJ has looked at the meaning of the word ‘contemplating’ in the Collective Redundancies Directive (the Directive), a phrase that has often been contrasted with ‘proposing’ in the Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992. Many commentators have argued that ‘proposing’ redundancies is at a later stage in the decision process and that TULRCA 1992 does not properly implement the Directive. This decision removes some of that uncertainty and in fact appears to have moved the trigger point for the obligation to consult in the Directive closer to that in TULRCA 1992. The ECJ also reached the following conclusions:

to consult is always on the subsidiary employer, which will be liable for any failure even if the parent company failed to properly or promptly inform the subsidiary of the decision. No obligation will arise, however, until the affected subsidiary has been identified.

- The obligation to start consulting is not subject to the employer possessing the information required to be given to employee representatives;
- The consultation must have concluded before a parent company (or indeed a subsidiary employer) makes the decision to terminate employment contracts.

The decision is a helpful reminder of when the obligation to consult on collective redundancies arises. A delay in starting the consultation could result in harsh penalties for the employer.

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Akavan Erityisalojen Keskusliitto AEK & ors (social policy) [2009] EUECJ C-44/08

‘Many commentators have argued that “proposing” redundancies is at a later stage in the decision process and that TULRCA 1992 does not properly implement the Directive.’

- In a corporate group, the obligation to consult is triggered where the strategic decision is taken by the parent company or a subsidiary employer. However, the obligation